IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RUDY BARLOW, JR.,

Plaintiff,

v.

KRAFT FOODS GLOBAL INC.,

Defendant.

OPINION AND ORDER

10-cv-319-bbc

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Plaintiff Rudy Barlow, Jr., a pipefitter for defendant Kraft Foods Global, Inc., sued defendant for race discrimination and retaliation under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act. After I dismissed plaintiff's retaliation claim at summary judgment, the case proceeded to trial on two claims that defendant discriminated against plaintiff because of his race by requiring him to work in the pretreatment department and by suspending him for poor performance. The jury found in defendant's favor on the second claim and in plaintiff's favor on the first claim, awarding plaintiff $32,000.

Taking issue with the jury's finding on plaintiff's claim that defendant assigned plaintiff to the pretreatment department because of his race, defendant has moved for judgment as a matter of law under Fed. R. Civ. P. 50 with respect to that claim. Defendant

challenges that claim on three grounds: (1) it is untimely; (2) the assignment to the pretreatment department did not constitute an adverse employment action; and (3) no reasonable jury could find that defendant required plaintiff to work in the pretreatment department because of his race. I agree with defendant that the claim is untimely. Plaintiff's four-year limitations period expired before he filed this lawsuit in 2010 because he knew of the alleged discriminatory act that is the subject of his claim when it occurred, which was in 2004. Because I conclude that defendant's motion must be granted on the first ground, I need not consider the other two.

OPINION

Plaintiff relied on § 1981 alone for his race discrimination claim regarding his assignment to the pretreatment department, which means that the statute of limitations was four years. 28 U.S.C. § 1658; Dandy v. United Parcel Service, Inc., 388 F.3d 263, 269 (7th Cir. 2004). (Title VII's limitations period is shorter. 42 U.S.C. § 2000e-5(e).) In a discrimination case, the limitations period begins to run when the employee learned of the discriminatory conduct, Lewis v. City of Chicago, 528 F.3d 488, 490-91 (7th Cir. 2008), or reasonably should have known about it. Jones v. Merchants National Bank & Trust Co. of Indianapolis, 42 F.3d 1054, 1058 (7th Cir. 1994). Because plaintiff filed his lawsuit on June 11, 2010, he may not recover for any act that he knew or should have known about before

June 11, 2006.

This is a problem for plaintiff. His theory is that defendant discriminated against him by requiring him to work in the pretreatment department even after less senior, white pipefitters were hired. It is undisputed that defendant hired new pipefitters in 2004, that plaintiff was aware of this and that he complained about it in 2004.

In an attempt to save his claim, plaintiff advances two arguments, both of which involve events in 2006. On May 4, 2006, defendant posted a position for "pretreatment: vacation replacement." Defendant chose Thomas Lohmiller to fill the position, but Lohmiller did not act as the sole vacation replacement until 2009. Plaintiff remained assigned to the pretreatment department until that time. (Defendant's human resources manager testified that Lohmiller could not take full responsibility because he "was in a position, a maintenance clerical position, that we had to train his backfill so he could get relieved." Tr. Trans., dkt. #114, at 163. Although plaintiff questions that explanation, he does not cite any testimony or other evidence to the contrary.)

Plaintiff says that the jury could have found reasonably that he did not realize he was the victim of discrimination until July 2006 when defendant required him to work in the pretreatment department despite having chosen Lohmiller to take that assignment. Alternatively, he says that defendant triggered a new limitations period when it continued to require him to work in the pretreatment department after Lohmiller was hired.

Unfortunately for plaintiff, neither of these arguments can carry the day for him. Plaintiff assumes in his first argument that the limitations period does not begin to run until the employee determines that the employer acted with discriminatory animus, but that is not the case. "A plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful." Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 267 (7th Cir. 1995). See also Lukovsky v. City and County of San Francisco, 535 F.3d 1044 (9th Cir. 2008) (discrimination claim under § 1981 accrued on date applicants were informed that they would not be hired, or when they should have realized that they had not been hired, rather than on date that they had reason to know of employers' alleged discrimination); Morris v. Government Development Bank of Puerto Rico, 27 F.3d 746, 750-51 (1st Cir. 1994) (declining to tie accrual to discovery of discriminatory motive because "[c]harting such a course could cause perpetual insecurity on the part of employers, for, unlike the giving of notice—a matter that is subject to objective verification—the time when an employee suspects an employer's discriminatory animus is almost impossible to verify, especially since the employer most often will deny that the animus exists at all.").

A plaintiff may be entitled to *tolling* of the limitations period if he shows "that he could not by the exercise of reasonable diligence have discovered essential information bearing on his claim," Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990), but plaintiff does not attempt to make that showing. Further, equitable tolling does not

delay the accrual of a claim, but only "suspends" the running of the limitations period for "a reasonable time after [the employee] has obtained, or by due diligence could have obtained, the necessary information." Id. at 453. By plaintiff's own admission, he had the necessary information as of July 2006, but he fails to explain why he waited almost four more years to file his claim.

In any event, even if I agreed with plaintiff that his claim did not accrue until he determined on his own that defendant was engaging in race discrimination, defendant cites testimony from the union president that plaintiff complained to him in 2004 that the assignment to the pretreatment department was discriminatory. Tr. Trans., dkt. #118, at 134. Plaintiff's own testimony was more equivocal, but he conceded that "[i]t's possible—yeah, I had that feeling all along" when asked whether he thought in 2004 the defendant was discriminating against him. Tr. Trans., dkt. #114, at 79. Although defendant cites both of these statements in its opening brief, plaintiff does not cite any contrary evidence or even acknowledge this testimony in his opposition brief.

Plaintiff's alternative argument is inconsistent with the special verdict form. At trial, I rejected the argument that defendant triggered a new limitations period when it continued sending plaintiff to the pretreatment department even after it chose Lohmiller as the vacation replacement. Although "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act," National Railroad Passenger Corp. v. Morgan, 536 U.S. 101

(2002), I concluded that plaintiff failed to identify a new, discrete act because defendant had been requiring plaintiff to work in the pretreatment department for years, so in 2006 it was simply continuing a decision it already made. Cf. Williamson v. Indiana University, 345 F.3d 459, 463 (7th Cir. 2003) ("[T]he decision not to reverse an adverse employment decision is not a fresh act of discrimination."); Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 552 (7th Cir. 1996) ("[A]ctions do not constitute new, separate discriminatory acts" if "they are part of the harm that continued to flow to the [employee] as a result of" previous decision.); Lever v. Northwestern University, 979 F.2d 552, 556 (7th Cir. 1992) ("An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination."). Accordingly, I did not include a question on the special verdict form asking the jury to give separate consideration to the events in 2006.

Plaintiff does not cite any authority showing that I erred in declining to classify his continued assignment in pretreatment department as a discrete act. In any event, because plaintiff does not challenge the verdict form now, he has waived this issue.

It is unfortunate that defendant failed to assert its statute of limitations defense until trial. If defendant had included this issue in its motion for summary judgment, it is likely that the time and resources of the parties, the court and the members of the jury could have been saved with respect to this claim. Nevertheless, plaintiff does not argue that defendant waived the defense. (Defendant did include a state of limitations defense in its answer.)

Although I am reluctant in any case to overturn the verdict of a conscientious jury, I must grant defendant's motion under Rule 50 because defendant has shown that plaintiff's claim is untimely as a matter of law.

ORDER

IT IS ORDERED that defendant Kraft Foods Global, Inc.'s motion for judgment as a matter of law, dkt. #130, is GRANTED, and plaintiff Rudy Barlow, Jr.'s motion for attorney fees, dkt. #124, is DENIED as moot. The clerk of court is directed to enter an amended judgment in favor of defendant and close this case.

Entered this 30th day of January, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

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